

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 18-CI-422**

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**COMMONWEALTH OF KENTUCKY,  
KENTUCKY LABOR CABINET**

**PLAINTIFF**

**v.**

**OPINION & ORDER**

**KENTUCKY PUBLIC RADIO, INC. d/b/a  
KENTUCKY CENTER FOR INVESTIGATIVE  
REPORTING**

**DEFENDANT**

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This matter is before the Court on the Motion for an Award of Attorneys' Fees and Statutory Penalties filed by Defendant Kentucky Public Radio, Inc. d/b/a Kentucky Center for Investigative Reporting ("KCIR"). The parties appeared before the Court on December 12, 2018. At that time, Michael Abate and Andrea Aikin appeared on behalf of KCIR and Michael G. Swansburg appeared on behalf of the Kentucky Labor Cabinet ("Cabinet").<sup>1</sup> Accordingly, having considered the arguments of counsel and being otherwise sufficiently advised, the Court hereby **GRANTS** KCIR's Motion for Fees and Penalties, for the reasons set forth below.

**BACKGROUND**

Though the factual background of this case is set forth in detail in this Court's October 11, 2018 Opinion and Order, the Court finds it helpful to briefly summarize those facts giving rise to this award of fees and costs:

On November 1, 2017, KCIR submitted a request to the Cabinet under the Kentucky Open Records Act seeking complaints, investigations, settlements, and disciplinary outcomes related to complaints of sexual misconduct in the workplace. The Cabinet initially provided a single set of

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<sup>1</sup> KCIR also filed a Motion for Fees and Penalties in a similar case, Civil Action No. 18-CI-355, which was heard simultaneously with the present matter on December 12, 2018. The Motion in that case is addressed by separate order.

records stemming from a 2015 complaint involving inappropriate sexual comments by a training officer. That claim had been substantiated after an investigation. A few weeks later,<sup>2</sup> the Cabinet produced a second set of documents. This second file arose from a 2016 complaint in which a female employee accused her male co-worker of making inappropriate sexual comments, showing pictures of women in various stages of undress, exposing his genitals, and forcing the female employee to place her hands on his genitals. These complaints were found to be unsubstantiated after an investigation, due primarily to the complainant's delay in reporting the incidents and the lack of eyewitness corroboration.

Initially, the Cabinet withheld certain documents and redacted certain information from each file. For example, the Cabinet redacted the names and personal identifying information of the accused, complainant, and their supervisors under the Act's personal privacy exemption, and it withheld draft versions of investigation reports and handwritten notes under the preliminary documents exemption. However, when KCIR appealed the Cabinet's response, the parties attempted to resolve the matter, and the Cabinet provided the investigation drafts and notes from the 2015 file, without redacting the name of the accused. It continued to redact the accused's name and other personal identifying information in the 2016 file.<sup>3</sup>

The Office of the Attorney General ("OAG") requested—and the Cabinet willingly provided—unredacted copies of the records at issue. The OAG reviewed these files and ultimately concluded that the privacy interests of an absolved public employee were outweighed by the public's interest in monitoring the agency's handling of such complaints.

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<sup>2</sup> At the December 12, 2018 hearing, the parties advised the Court that much of the delay in producing documents resulted from the recent reorganization of the Cabinet, which made it difficult to locate certain files.

<sup>3</sup> The Cabinet also continued to redact the complainant's name and identifying information from both files. The OAG found that the 2016 complainant's information had been properly withheld, but that portion of the OAG's decision was not appealed to this Court. The only issue before the Court was whether the state agency was required to reveal the identity of the accused in the 2016 matter involving an unsubstantiated complaint.

The Cabinet thereafter appealed to this Court. On October 11, 2018, this Court granted summary judgment in favor of KCIR. In its Opinion and Order, the Court balanced the privacy interest in nondisclosure of personal information against the public's right to inspect whether its agencies are properly performing their public functions. By disclosing complaints and investigation materials, for example, the public could determine whether publicly-funded state agencies are efficiently, effectively, and fairly investigating the misconduct of public employees. This public interest outweighed the minimal privacy interests involved, and the Court therefore granted summary judgment in favor of KCIR. KCIR then filed its Motion for Fees and Penalties, which has been fully briefed and argued and is now ripe for decision.

### ANALYSIS

KCIR asks that this Court award attorney's fees and penalties under KRS 61.882(5). That provision provides,

Any person who prevails against any agency in any action in the courts regarding a violation of [Kentucky's Open Records Act] may, upon a finding that the records were willfully withheld in violation of [Kentucky's Open Records Act], be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action.

The statute also states that "it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public record."

Accordingly, "[t]o be entitled to attorneys' fees, costs, and penalties under KRS 61.882(5), the circuit court must find that the public agency acted 'willfully' in denying a 'person' access to requested records under the Open Records Act." *Cabinet for Health and Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 384 (Ky. App. 2016). However, "[a] public agency's mere refusal to furnish records based on a good faith claim of a statutory exemption, which is later determined

to be incorrect, is insufficient to establish a willful violation of the Act.” *Id.* (quoting *Bowling v. Lexington-Fayette Urban Cnty. Govt’t.*, 172 S.W.3d 333, 343 (Ky. 2005)) (internal quotation marks omitted). Instead, “[w]illful action ‘connotes that the agency withheld records without plausible justification and with conscious disregard of the requester’s rights.’” *Id.* (quoting *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013)).

However, “[w]here ‘willfulness’ is found, the statute still leaves the imposition of fees, costs, and/or penalties to the trial court’s discretion.” *Id.* When determining whether such an award is appropriate, the court should consider “the extent of the agency’s wrongful withholding of records; the withholding’s egregiousness; harm to the requester as a result of the wrongful withholding, including the expense of litigating the matter; and the extent to which the request could be thought to serve an important public purpose.” *Id.* (citation omitted). A trial court’s award of fees, costs, and penalties will be upheld on appeal unless the court abused its discretion by rendering an award that is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (quoting *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky.2004) (internal quotation marks omitted)).

**I. The Cabinet redacted non-exempt information without plausible justification and in conscious disregard of KCIR’s rights under the Kentucky Open Records Act.**

In the present case, the Cabinet contends that it acted in good faith, or with plausible justification, by relying primarily on *Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government*, 297 S.W.3d 579 (Ky. App. 2009) and the OAG’s decision in *Georgetown News-Graphic/Georgetown Police Department*, 12-ORD-227. These decisions involved Open Record Act requests for criminal investigation materials of private individuals or entities. For example, in *Lexington H-L*, a newspaper reporter sought a closed police file involving an alleged

but unprosecuted rape. Similarly, the OAG's *Georgetown News-Graphic* decision involved a reporter's request for materials related to a closed investigation into theft, fraud, and embezzlement committed by an employee of Kentucky Lighting & Supply, a private company. In both cases, the individual suspects were not charged after investigation, and in both cases, the privacy interests of those exonerated individuals outweighed the public interest in disclosure. For example, the uncharged suspects—both private citizens<sup>4</sup>—would undoubtedly be subjected to ridicule, scorn, and harassment. Under the circumstances of those cases, those privacy interests outweighed the public interest in ensuring that such crimes were adequately investigated. Those matters involved criminal charges, in which the constitutional presumption of innocence further supports a claim of privacy interests.

However, in its October 11, 2018 decision, this Court found that records involving allegations of workplace misconduct by public employees in a public agency should be considered presumptively public. This holding was not a novel revelation; rather, it is well-supported by a long line of persuasive decisions by the OAG,<sup>5</sup> as well as case law from the Court of Appeals. *See, e.g., Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001). For example, in *Palmer v. Driggers*, the Court of Appeals considered whether the Act's personal privacy exemption covered a complaint of misconduct committed by a police officer. The Court of Appeals noted that the complaint presented "a matter of unique public interest," as it alleged that this officer neglected his duty to the public by having an inappropriate relationship with another officer while on duty.

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<sup>4</sup> The Court notes that the suspect in the *Georgetown News-Graphic* case was a manager of Kentucky Lighting & Supply but was also a city council member. The alleged crimes, however, did not appear to involve any actions taken in his role as council member.

<sup>5</sup> A small sampling of relevant OAG decisions are cited in KCIR's briefs and include the following: 2-ORD-055; 07-ORD-241; 04-ORD-031; 02-ORD-231; 02-ORD-75; 99-ORD-105; 96-ORD-177; 92-ORD-1515; OAG 92-34; OAG 91-198; OAG 91-41; OAG 88-25; OAG 87-64; OAG 78-133.

*Id.* at 599. Thus, the Court explained, the public had a “legitimate interest” in learning more about the underlying allegations and disciplinary action. *Id.*

Unlike the case law relied upon by the Cabinet, which addresses the privacy interests of *private* individuals, the *Palmer* and OAG decisions deal specifically with *public* employees. They expressly hold that any potential negative attention that the employees might receive is outweighed by the public’s interest in ensuring that those employees, whose salaries are funded by tax payer dollars, are working for the benefit of the public and that any misconduct is effectively investigated and efficiently resolved by the publicly-funded agency. In other words, when the alleged misconduct was committed by a public employee while working at or representing a public agency, the public interest outweighs the minimal privacy interests involved. Simply put, what happens in the public workplace is a legitimate matter of public concern. This principle is well-established by the line of decisions cited above.

Given the clear guidance provided by the OAG, this Court, and the *Palmer* decision, it was unreasonable for the Cabinet to rely on the *Lexington H-L* line of decisions involving alleged misconduct and criminal investigations of private individuals. In other words, the Cabinet intentionally disregarded clearly applicable and persuasive precedent in favor of decisions that were factually and legally inapplicable. The cases relied on by the Cabinet provided no support for the claimed exemptions unless stretched beyond their stated holdings. Accordingly, this Court finds that the Cabinet redacted the information at issue without plausible justification and in conscious disregard of KCIR’s rights to view such information under the Kentucky Open Records Act.

As a result of the Cabinet’s willful noncompliance, KCIR was forced to defend its request before the OAG and then, at the Cabinet’s insistence, in this Court. In doing so, KCIR incurred

significant expenses and costs, and the litigation inevitably delayed compliance. This defeats the very purpose of the Open Records Act, which is premised upon the legislative finding that “free and open examination of public records is in the public interest.” KRS 61.871. Here, the policy of the Act would be egregiously undermined if a public agency is permitted to haul citizen requestors into court, thereby imposing the burden of attorney’s fees and legal defense on the parties seeking public access. The successful party would be effectively penalized for vindicating the public’s right to know under the Act, which would turn the policy of the Open Records Act on its head and discourage citizens from exercising their rights to obtain public records. Accordingly, the Court finds that an award of attorney’s fees and statutory penalties is warranted under KRS 61.882(5).

**II. An award of attorney’s fees and statutory penalties is appropriate under the facts of this case.**

The Court has reviewed KCIR’s Motion for Fees and Penalties and supporting documents and hereby finds that the amount of time expended by KCIR’s attorneys was reasonable, and their rates for legal services were also reasonable. The Court further finds that an award of attorney fees and penalties is necessary and appropriate in this case to vindicate the statutory requirements of the Kentucky Open Records Act.

Absent an award of attorney’s fees and penalties in these circumstances, state agencies would be rewarded for obstructing timely compliance with the Act and would have an incentive to initiate legal proceedings to delay compliance. The requesting parties, who wish only to exercise the rights afforded to them under the Act, would in turn be punished with the heavy costs, burdens, and delays inherent in defending a lawsuit. This inevitably discourages requesting parties from challenging an agency’s decision to withhold or redact documents, and in some cases may

discourage the initial request entirely. As this Court previously explained in *Lexington Herald-Leader v. Cabinet for Health and Family Services*, No. 09-CI-1742:

The intent of the Kentucky Open Records Act to provide attorneys fees for willful violation is similar to the provision for attorney's fees and costs in the Federal Freedom of Information Act.<sup>6</sup> Such provision in FOIA for attorney's fees "had a . . . purpose to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation."

Opinion and Order, Sept. 29, 2010 (internal citations omitted), *affirmed*, *Cabinet for Health and Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875 (Ky. App. 2012).

Clearly, this would serve only to defeat the purposes of the Act, which "seeks to ensure the free and open examination of public records." *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818, 821 (Ky. 2008). Under these circumstances, the Act requires that the costs incurred due to a state agency's intentional non-compliance with the Act be borne by that agency. The Court therefore awards \$16,266.50 in attorney's fees and \$800.00 in statutory penalties.<sup>7</sup>

### CONCLUSION

For the reasons set forth above, the Court finds that the Cabinet willfully withheld non-exempt information without plausible justification and in conscious disregard of the rights of KCIR. Accordingly, pursuant to KRS 61.882(5), the Court **GRANTS** Defendant's Motion for an

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<sup>6</sup> "In 1974, Congress amended the Freedom of Information Act (5 U.S.C.A. § 552) when it realized that only financially 'well-heeled' plaintiffs would be able to afford the expense of bringing suits under the Act, since, almost by definition, an action under FOIA seeks documents or other materials that have little intrinsic value, rather than money damages out of which an attorney could take a contingent fee. Thus, consistent with the important national policy favoring disclosure of government information, Congress included in the 1974 amendments the provision codified at 5 U.S.C.A. § 552(a)(4)(E), which provides that a complainant who has 'substantially prevailed' in a FOIA suit may receive reasonable attorney's fees and other litigation costs reasonably incurred." 179 A.L.R. Fed 1 § 2(a).

<sup>7</sup> KCIR submitted its request on November 1, 2017. The Cabinet responded and redacted the information at issue on December 5, 2017. KCIR then appealed to the OAG on January 8, 2018. Thus, the statutory penalties are calculated as follows: 32 days (December 5, 2017–January 8, 2018) x \$25.00 a day = \$800.00.



Award of Attorney's Fees and **AWARDS** \$16,266.50 in attorneys' fees and \$800.00 in statutory penalties, for a total award of \$17,066.50. This is a final and appealable order and there is no just cause for delay.

**SO ORDERED** this 9th day of April, 2019.



PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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